90-1884

NO. _____

Supreme Court, U.S.
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**IN THE**
**SUPREME COURT OF THE UNITED STATES**
**OCTOBER TERM, 1990**

Prudential Insurance Company
of America,

Petitioner,

v.

Billy W. Brown,

Respondent.

**PETITION FOR WRIT OF CERTIORARI**
**TO THE TEXAS FOURTEENTH**
**COURT OF APPEALS**

PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

1. Whether Respondent's state common law claims of breach of contract, breach of duty of good faith and fair dealing, and gross negligence are preempted by the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 et. seq.

## LIST OF PARTIES

The parties to the proceedings below are as follows:

**Petitioner**

Prudential Insurance Company of America[1];

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1. Prudential Insurance Company of America has the following subsidiaries: PRUCO, Inc.; Chatham Eight Corporation; Flor-Ag Corporation; Newark Rehabilitation, Inc.; PG Realty, Inc.; PIC Realty Corp.; Pruco Life Insurance Co. of Texas; Pruco Securities Corp.; Pruco Services, Inc ; Prudential Agricultural Credit, Inc.; Prudential Capital & Investment Services, Inc.; Prudential-Bache Group, Inc.; Prudential-Bache Securities Inc.; The Prudential Bank and Trust Co.; Pru Capital, Inc.; PruLease, Inc.; Prudential Interfunding Corp.; PruCapital Management, Inc.; PruCapital Securities Co., Inc.; Pru Supply, Inc.; Prudential Support Operations, Inc.; Prudential Funding Corp.; Prudential Health Care Plan, Inc.; Prudential Health Care Plan of Oklahoma, Inc.; Prudential Property & Casualty Insurance Company; Prudential Commercial Insurance Co.; Prudential Insurance Brokerage Inc.; Prudential General Insurance Co.; Prudential Realty Partnerships, Inc.; Prudential Realty Securities, Inc.; Prudential Trust Co.; Prudential Reinsurance Co.; Dryden & Co., Inc.; Dryden General Agency; Essex Syndicate, Inc.; Gibraltar Casualty Co.; John Street Syndicate, Inc.; Pruco Managers, Inc.; Pruco Syndicate, Inc.; Pruco Life Insurance Company; Pruco Life Insurance Company of New Jersey; 745 Property Investments; Pruco Life Insurance Co. of Illinois; The Prudential Investment Corp.; The Prudential Asset Management Co., Inc.; Mercator Asset Management Co., Inc.; The Prudential Property Co., Inc.; The Prudential Mortgage Capital Co., Inc.; Prudential-LMI Commercial Insurance Company; Property & Casualty Insurance Co.; and Prudential Realty Securities II, Inc.

**Respondent**

Billy W. Brown.

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TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner herein prays that a Writ of Certiorari issue to the Texas Fourteenth Court of Appeals to review

that Court's August 9, 1990 Judgment and Order in this proceeding.[2]

## Opinions Below

The August 9, 1990 Judgment and Opinion of the Texas Fourteenth Court of Appeals from which review is sought is not reported, but is attached as Appendix A to this Petition.

The April 3, 1990 Judgment of the district court of Harris County, Texas, 151st Judicial District from which Petitioner appealed is not reported, but is attached as Appendix B to this Petition.

The May 2, 1989 Findings of Fact and Conclusions of Law of the district court of Harris County, Texas, 151st Judicial District from which Petitioners

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2. On February 6, 1991, the Texas Supreme Court denied Petitioner's Application for Writ of Error. On March 6, 1991, the Texas Supreme Court overruled Petitioner's timely-filed motion for rehearing.

appealed is not reported, but is attached as Appendix C to this Petition.

## Jurisdiction

On August 9, 1990, the Texas Fourteenth Court of Appeals entered the Judgment from which review is sought. Jurisdiction is now conferred upon this Court by 28 U.S.C. Section 1257(a). The time for filing this petition for writ of certiorari began to run on March 6, 1991, the date of the Order of the Texas Supreme Court overruling petitioner's timely-filed motion for rehearing. See Sup. Ct. R. 13 (1991).[3]

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3. The February 6, 1991 Order of the Texas Supreme Court denying Petitioner's timely application for writ of error is attached as Appendix D to this Petition. The March 6, 1991 Order of the Texas Supreme Court overruling petitioner's motion for rehearing is attached as Appendix E to this Petition. The September 6, 1990 Order of the Texas Fourteenth Court of Appeals overruling petitioner's motion for rehearing is attached as Appendix F to this Petition.

## Statutes and Rules Involved

Section 1002, Title 29, United States Code provides as follows:

For purposes of this subchapter:

1. The terms "employee welfare benefit plan" and "welfare plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (a) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits. . . .

5. The term "employer" means any person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan; and includes a group or association of employers acting for an employer in such capacity.

6. The term "employee" means any individual employed by an employer.

> 7. The term "participant" means any employee or former employee of an employer, or any member or former member of an employee organization, who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer or members of such organization, or whose beneficiaries may be eligible to receive any such benefit.
>
> 8. The term "beneficiary" means a person designated by a participant, or by the terms of an employee benefit plan, who is or may become entitled to a benefit thereunder.

29 U.S.C. § 1002 (1991).

Section 1144(a), Title 29, United States Code provides as follows:

> Except as otherwise provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all state laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975.

29 U.S.C. § 1144(a) (1991).

## Statement of The Case

This case involves the determination of whether Respondent's state law claims are preempted by ERISA.

## Factual Background

On March 18, 1964, the Independent Garagemen's Association Insurance Trust ("Insurance Trust") was created by the execution of an Agreement and Declaration of Trust by the Independent Garagemen's Association ("IGA").[4] This Insurance Trust was created for the purpose of obtaining major medical and life insurance for the

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4. The IGA is a trade organization whose membership is limited to employers who operate independent automotive repair shops throughout the United States. (Richey Depo. pp. 44, 50; SF 1523-24) During the relevant time period, IGA's name was changed to the Independent Automotive Service Association. For clarity, however, it will be referred to as the "IGA" for all time periods.

employees of employer members of the IGA. (Richey Ex. 2, p. 1)[5]

Petitioner, The Prudential Insurance Company of America ("Prudential"), issued a policy, effective May 15, 1976, of group medical insurance to the Insurance Trust (the "Policy"). (SF 2191-92; Richey Ex. 13). It is undisputed that Respondent, Billy W. Brown ("Brown"), at all time material to this lawsuit, was employed by Sonny's Automatic Transmission Service ("Sonny's"), an employer who was a member of the IGA and who participated in the Insurance Trust. (Richey Ex. 3; Richey Depo. pp. 35, 36, 38; Tr. 34) Thus, at all material times, Brown was

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5. Hereinafter, references to the record are as follows: "SF" means statement of facts; "TR" means transcript; "F.S. Tr." means first supplemental transcript; "E.P.Tr." means ERISA preemption trial transcript; "Richey Depo." means deposition of Jean Richey; "Richey Ex." means exhibit attached to the deposition of Jean Richey; "P.Ex." means plaintiff's exhibit; and "D.Ex." means defendant's exhibit.

insured under the Policy solely because of his capacity as an employee of Sonny's. (Tr. 34; SF 1486-87)

In April 1979, Brown was diagnosed as having bladder cancer. (Tr. 35; SF 640) Brown was treated by a number of physicians and underwent conventional surgery, chemotherapy, and radiation treatments in an attempt to cure the cancer. (SF 643) Without having determined whether these repeated conventional treatments were successful, Brown went to a Houston physician, Dr. Stanislaw R. Burzynski ("Burzynski"), and the Burzynski Research Institute, and was treated there with an experimental, non-FDA approved drug -- "antineoplaston" -- developed and manufactured by Burzynski. It is undisputed that Prudential, on its own or through the Insurance Trust as the

claims administrator, paid for all of Brown's cancer treatment -- including office visits to and lab work done by Burzynski -- with the sole exception of the costs incurred for antineoplastons. (SF 1533, 2284-85; D.Ex. 105; P.Ex. 99, p. 86) Prudential determined that antineoplastons were not "reasonably necessary", under the terms of the Policy, and that payment should be disallowed. (P.Ex. 99, p. 85; SF 2250-52).

Brown brought the present action against Prudential based on breach of contract, breach of duty of good faith and fair dealing, and gross negligence. (Tr. 34-40) Prudential thereafter asserted, in its Second Amended Original Answer, that all of Brown's claims are preempted by ERISA because: (1) Brown's employer, Sonny's, established and

maintained an "employee welfare benefit plan" by providing insurance for its employees through the Insurance Trust; and/or (2) the IGA established and maintained an "employee welfare benefit plan" for the benefit of employees of employer members of the IGA. (Defendant's Second Amended Original Answer is attached as Appendix "G.")

The case was originally tried on May 20, 1987, in which both a jury verdict and judgment were rendered in favor of Prudential. Brown thereafter filed a motion for new trial, which was granted, and on January 26, 1989, the case was again tried. In the second trial, both a jury verdict and judgment were rendered in favor of Brown. According to the judgment, the trial court found that none of Brown's claims were preempted and that Brown was

entitled to recover under each theory alleged. (Appendix B-14)

On May 2, 1989, the trial court entered its Findings of Fact and Conclusions of Law with respect to the issue of ERISA preemption holding that the Insurance Trust[6] is not an "employer" within the meaning of 29 U.S.C. § 1002(5), and that the IGA is not an "employee organization" as defined by 29 U.S.C. § 1002(4) (Appendix "C-11"). The trial court then held that Brown's state law claims are not preempted by ERISA. (Appendix C-11, 12)

On May 3, 1989, Prudential filed Defendant's Motions for Judgment Notwithstanding the Verdict, New Trial

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6. Prudential did not even argue that the Insurance Trust is an employer, which of course, it is not; instead, Prudential argued that Sonny's Automatic Transmission Service is an "employer." The trial court, in its findings of fact and conclusions of law, never found that Sonny's was not an employer.

and Remittitur in which Prudential argued that all of Brown's claims are preempted by ERISA (Defendant's Motions for Judgment Notwithstanding the Verdict, New Trial and Remittitur are attached as Appendix "H.") The trial court, however, did not rule on such motions, and they were deemed overruled by operation of law.

On January 15, 1990, Prudential timely filed an appeal to the Texas Fourteenth Court of Appeals. In its brief, Prudential argued that all of Brown's claims are preempted by ERISA, as a matter of law, because: (1) Brown's employer, Sonny's, established an "employee welfare benefit plan" by providing insurance for its employees through the Insurance Trust; and/or (2) the IGA as a group of employers, acting on behalf of these employers,

established and maintained an "employee welfare benefit plan" subject to ERISA. See pp. 17-33 of Prudential's Brief to Fourteenth Court of Appeals.

Further, in its second point of error to the Fourteenth Court of Appeals, Prudential argued that:

> The trial court erred in finding in its Conclusion of Law that the Insurance Trust is not an employee welfare benefit plan and, thus, not governed by ERISA. The trial court also erred in finding that the transactions between the IGA Insurance Trust (the 'Insurance Trust'), the IGA members adopting the Insurance Trust (the 'Adopting Members'), and Prudential were mere purchases of insurance. . .

Id. at pp. 17-18.[7]

On August 9, 1990, the Texas Fourteenth Court of Appeals affirmed the

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7. Respondent has previously argued that Prudential failed to challenge the trial court's findings of fact and conclusions of law by a point of error to the Fourteenth Court of Appeals. This argument is unfounded based on the portion of Prudential's second point of error quoted above.

lower court and issued the opinion of which Prudential seeks review. See Appendix A. Prudential thereafter filed a timely motion for rehearing in the Fourteenth Court of Appeals arguing that Brown's claims are preempted by ERISA. On September 6, 1990, the Fourteenth Court of Appeals overruled Prudential's motion for rehearing. See Appendix "F."

On October 5, 1990, Prudential filed in the Texas Supreme Court, a motion for a seven-day extension of time to file an application for writ of error -- which the Texas Supreme Court granted. See Appendix "I." On October 15, 1990, Prudential timely filed its application for writ of error to the Texas Supreme Court, again arguing that all of Brown's claims are preempted by ERISA as a matter of law.

On February 6, 1991, the Texas Supreme Court denied Prudential's application for writ of error. See Appendix "D." On February 21, 1991, Prudential timely filed its motion for rehearing in the Texas Supreme Court -- which was thereafter overruled. See Appendix "E."

Prudential seeks review of the Texas Fourteenth Court of Appeals' decision rendered below. Prudential maintains in this Court that all of Brown's state law claims are preempted by ERISA, as a matter of law, because: (1) Brown's employer established and maintained an "employee welfare benefit plan" by providing insurance for its employees through the Insurance Trust; and, in the alternative, (2) the IGA established and maintained an "employee welfare benefit plan" for the benefit of

employees of employer members of the IGA.

## Reasons for Granting the Writ

The decision of the Fourteenth Court of Appeals conflicts with the decisions of this Court in FMC Corp. v. Holliday, 111 S. Ct. 403 (1990), and Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58 (1987); and conflicts with the decisions of the Fifth Circuit in Memorial Hospital System v. Northbrook Life Ins. Co., 904 F.2d 236 (5th Cir. 1990), and Kidder v. H&B Marine, Inc., No. 90-3340 (5th Cir. April 12, 1991) (1991 WL 77363). Further, the Fourteenth Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court:

> Whether an employer who provides insurance for its employees through a trust agreement has established an

"employee welfare benefit plan" as that term is defined under ERISA.

Today, there are literally thousands of employers who are too small to obtain group insurance on their own. These employers, such as Sonny's, typically band together and procure insurance through a trust agreement or other types of agreements to facilitate the transfer of group insurance to their employees. The question at issue here is of vital importance to these small businesses who should be given the adequate security that their "group policies" are protected by ERISA and that there will be no unnecessary litigation, as occurred in this case, in determining or applying conflicting law. The Fourteenth Court of Appeals' decision below adds numerous factors that a smaller employer must prove in

order to be covered by ERISA, which factors are not expressed within the scope or purview of ERISA. The number of recent cases which have been appealed to the federal circuit courts on the very same issue here[8] exemplifies the confusion and conflict that exists -- which will continue to exist unless this Court provides the overall guidance needed.

## ERISA PREEMPTION CLAUSE

This Court has previously held that ERISA's preemption clause, 29 U.S.C. § 1144(a), broadly establishes as an area of exclusive federal concern the subject of every state law that "relates

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8. See, e.g., Kidder v. H & B Marine, Inc., No. 90-3340 (5th Cir. April 12, 1991) (1991 WL 77363); Gahn v. Allstate Life Ins. Co., 926 F.2d 1449 (5th Cir. 1991); Memorial Hospital System v. Northbrook Life Ins. Co., 904 F.2d 236 (5th Cir. 1990); Wickman v. Northwestern National Ins. Co., 908 F.2d 1077 (1st Cir. 1990); Kanne v. Connecticut General Life Ins. Co., 867 F.2d 489 (9th Cir.), cert. denied, 492 U.S. 906 (1989).

to" an "employee benefit plan." FMC Corp. v. Holliday, 111 S. Ct. 403 (1990); Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724 (1985). Further, this Court in Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58 (1987), held that an employee's state common law contract and tort claims arising from an insurer's termination of benefits under an "employee benefit plan" are preempted by ERISA.

As briefed below, because Brown was provided insurance through an "employee welfare benefit plan" as that term is defined in 29 U.S.C. § 1002 (1991), all of Brown's state common law contract and tort claims asserted herein are preempted.

1. An "Employee Welfare Benefit Plan" Exists as a Matter of Law

ERISA defines an "employee welfare benefit plan" as follows:

> any [1] plan, fund, or program which was heretofore or is hereafter; [2] established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained; [3] for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits in the event of sickness, accident, disability, [or] death . . .

ERISA Section 3(1), 29 U.S.C. Section 1002(1) (emphasis added).[9] Petitioner is entitled to judgment in this case because, as a matter law, (1) a plan was established, (2) by an employer, (3) through the purchase of insurance benefits.

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9. Congress intended the statutory provisions of ERISA to be "liberally construed" to cover all employee benefit plans not expressly exempted. See, e.g., H. Conference Rep. No. 1280, 93d Cong., 2d Sess. (1974), reprinted in 1974 U.S. Code Cong. & Ad. News 4639, 5038, 5038-39. See also Bell v. Employee Security Benefit Ass'n., 437 F. Supp. 382, 392 (D. Kansas 1977) ("it is obvious from § 1002(4) that Congress intended to give as broad a definition as possible to EBPs" . . . (i.e., employee benefit plans)).

A. **THE INSURANCE TRUST IS A "PLAN, FUND OR PROGRAM" FOR PURPOSES OF ERISA**

A plan, fund or program under ERISA is established if "from the surrounding circumstances a reasonable person can ascertain [1] the intended benefits, [2] a class of beneficiaries, [3] the source of financing and [4] procedures for receiving benefits." Donovan v. Dillingham, 688 F.2d 1367, 1372 (11th Cir. 1982) (en banc). See also Scott v. Gulf Oil Corp., 754 F.2d 1499, 1504 (9th Cir. 1985).

In this case, the Insurance Trust was established pursuant to the Agreement and Declaration of Trust, as attached hereto as Appendix "J" ("Declaration of Trust"), which, in addition to the "Group Policy" and "plan booklets" discussed hereafter, set forth

all of the above-quoted requirements for an employee welfare benefit plan:

(a) **Intended Benefits**. Article I of the Declaration of Trust identifies the intended benefits of the Insurance Trust as being the provision of "life and accident and health insurance" through "one or more group policies issued by insurance carriers." (Appendix J-2; Richey Ex. 2, p. 1.)

(b) **Intended Class of Beneficiaries**. Article I of the Declaration of Trust identifies the intended class of beneficiaries of the Insurance Trust as being "employees of employers and members of families of employees." The term "employees" shall comprise "employees of employers, and proprietors and partners whenever an employer is a proprietorship or a partnership, if such proprietors and

partners are actively engaged in and devote a substantial part of their time to the conduct of the business of the employer and the Trustees and their employees." (Appendix J-2; Richey Ex. 2, p. 1.) Finally, the "Group Policy" issued by Prudential to the Insurance Trust (Policy No. G-81780) requires that only those who are "primarily engaged in the repair and servicing of automobiles" may participate under the Group Policy. (Richey Ex. 13)

(c) **Source of Financing**. Articles III and IV of the Declaration of Trust establish the source of financing for the Insurance Trust in that "a corporation, proprietorship or partnership that is accepted as a Subscriber shall thereafter make payments on such dates and in such amounts as the Trustees shall require

for providing the insurance" and further, that "each Subscriber may require contributions from his insured employees." (Appendix J-5, 6; Richey Ex. 2, p. 2.) The Declaration of Trust also provides for the proper "use(s) of the funds" (e.g., pay premiums, make refunds, pay all necessary expenses) (Appendix J-7, Richey Ex. 2, p. 3.)

(d) **Procedures for Receiving Benefits**. Article II of the Declaration of Trust authorizes the trustees of the Insurance Trust to procure suitable insurance policies, "to take any action with respect to each policy for the insurance provided thereunder permitted by the insurance carrier," and to agree with insurance carriers that a representative of the trustees may "sign drafts upon the insurance carrier in the amounts approved for the payment of

claims under a policy," thereby facilitating "short method claim administration." (Appendix J-3; Richey Ex. 2, pp. 1-2.) Article III, Section 4 authorizes the trustees to "adopt such rules and regulations including any requirements for eligibility of Subscribers for participation in the Trust and require the Subscribers to furnish such information as the Trustees deem necessary or advisable." (Appendix J-5, 6, 7; Richey Ex. 2, p. 3.) Through these provisions, Article II establishes the procedures for receiving benefits under the Insurance Trust. The Insurance Trust communicates those procedures more specifically to the IGA members and their employees by providing them with "plan booklets" published by the insurance carrier, which includes benefit schedules and procedures for

making and appealing claims and receiving benefits. (Richey Depo. pp. 75-76; Richey Ex. 12.) See Holcomb v. Pilot Life Ins. Co., 754 F.Supp. 524, 527 (S.D. Miss. 1990) (court used "plan booklet," in part, to determine the source of financing, the beneficiaries, the intended benefits, and the procedure for receiving benefits).

Of most significance, the "Group Policy" (referred to on p. 23, supra) issued by Prudential to the IGA, sets out in considerable detail the intended benefits, class of beneficiaries, source of financing and procedures for receiving benefits. (Richey Ex. 13).[10]

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10. The "Group Policy" describes, in part, the intended benefits as "term life, accidental death and dismemberment, major medical, and supplemental accident insurance"; the intended class of beneficiaries as "all Employees of the Employer who are within the coverage classes under one or more Coverage Schedules"; the source of financing as "payable by the Policy-holder" with express limitations on the amount that an employee may contribute; and procedures (continued...)

See also Memorial Hospital System v. Northbrook Life Ins. Co., 904 F.2d 236, 240 (5th Cir. 1990) (court focussed on "group policy" to determine the intended benefits, the class of beneficiaries, the source of financing and means of receiving benefits).

Finally, the Insurance Trust has filed its Declaration of Trust and its Annual Returns (Form 5500 Dept. of Treasury) with the United States Government for the purpose of complying with ERISA. (Richey Depo. pp. 17-18; Richey Ex. 5-9) The Insurance Trust itself considers the Declaration of Trust to be "the plan" for purposes of ERISA. (F.S. Tr. 1173-74, 1182-87; Richey Depo. pp. 17-18; Richey Ex. 2) See Kanne v. Connecticut General Life

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10. (...continued)
for receiving benefits as paid according to the detailed schedule contained within the Group Policy. (Richey Ex. 13)

Ins. Co., 859 F.2d 96, 99 (9th Cir. 1988), cert. denied, 492 U.S. 906 (1989) (the court found it significant that the "plan" submitted by the insurance company described and considered such plan as an ERISA plan).

Thus, according to the Declaration of Trust, the "plan booklets," and the "Group Policy,"[11] and in satisfaction of the above-quoted requirements for an "employee welfare benefit plan," the Insurance Trust constitutes a "plan, fund, or program," under ERISA. 29 U.S.C. § 1002(1). Donovan v. Dillingham, 688 F.2d at 1372.

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11. The Declaration of Trust, the "plan booklets" and the "Group Policy" were all made a part of the record below. See Richey Ex. 2, 12 and 13.

B. **THE INSURANCE TRUST WAS ESTABLISHED AND/OR MAINTAINED BY AN "EMPLOYER" FOR PURPOSES OF ERISA**

Pursuant to Section 3(5) of ERISA, an "employer" is defined as:

> any person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan; and includes a group or association of employers acting for an employer in such capacity.

29 U.S.C. § 1002(5) (emphasis added). Here, the Insurance Trust was established and maintained by an employer, as required by Section 3(1) of ERISA, because the Declaration of Trust was adopted by the IGA and by each of the Adopting Members, including Brown's employer, Sonny's Automatic Transmission Service. (S.F. Tr. 666, 668, 703, 709; Richey Ex. 2; Richey Depo. pp. 34, 35, 37, 38) Therefore, both Brown's employer, and alternatively, the IGA, is an "employer" for purposes of ERISA.

1. **Sonny's Automatic Transmission Service Constitutes an "Employer" for Purposes of ERISA**

Each benefit program provided by an employer for his employees, to the extent that it meets the "plan" definition under ERISA Section 3(1), is considered an "employee welfare benefit plan." Kidder v. H&B Marine, Inc., No. 90-3340 (5th Cir. Apr. 12, 1991) (1991 WL 77363); Memorial Hospital System v. Northbrook Life Ins. Co., 904 F.2d 236, 241-42 (5th Cir. 1990); Foxworth v. Durham Life Ins. Co.; 745 F. Supp. 1227, 1230 (S.D. Miss. 1990). See also Dep't of Labor Op. Ltr. 89-19A (Aug. 12, 1989) ("each employer which has elected to provide benefits described in 3(1) to its employees through the Trust has

established its own separate benefit plan subject to Title I of ERISA").[12]

At all times material to this lawsuit, Brown's employer, Sonny's, provided health insurance for its employees through the Insurance Trust, and such health insurance was provided by a group medical insurance policy with Prudential. (S.F. 666, 668, 703, 709; Richey Depo. pp. 34, 35, 37, 38, 81, 82) Such insurance was provided and paid for by Sonny's on behalf of Brown as an employee benefit.[13] (Richey Depo. pp.

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12. There are numerous, additional DOL opinion letters which state that employers, who provide and purchase insurance for employees through a trust, establish their own separate plan. See, e.g., Dep't of Labor Op. Ltr. 89-13A (July 20, 1989); Dep't of Labor Op. Ltr. 84-31A (July 9, 1984); Dep't of Labor Op. Ltr. 84-41A (Oct. 26, 1984); Dep't of Labor Op. Ltr. 84-47A (Dec. 5, 1984); Dep't of Labor Op. Ltr. 83-14A (March 14, 1983).

13. At trial, Brown testified that Sonny's "purchased" Brown's health and medical insurance "as an employee benefit." (S.F. Tr. 668). Further, the "Group Policy" which covered Brown limited the amount that any employee could contribute toward the payment of their insurance. (Richey Ex. 13)

81, 82; S.F. Tr. 668) Neither Brown, nor any employee of the IGA's Adopting Members, could independently obtain or purchase this insurance.[14] (Richey Depo. p. 34.) Thus, as an "adopting member," Brown's employer established an individual "plan" under ERISA. Kidder v. H&B Marine, Inc., No. 90-3340 (5th Cir. April 12, 1991) (1991 WL 77363); Memorial Hospital System v. Northbrook Life Ins. Co., 904 F.2d 236, 241-42 (5th Cir. 1990); Foxworth v. Durham Life Ins. Co., 745 F. Supp. 1227, 1230 (S.D. Miss. 1990).

The Texas Fourteenth Court of Appeals below held that the Insurance Trust was not established nor maintained by a "statutory employer or employee

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14. Brown derived all insurance benefits from his employers' adoption of the Insurance Trust. There was no privity of contract between Brown and Prudential.

organization," as those terms are defined under ERISA, because:

1. Brown's employer, Sonny's Transmission, did not participate in the insurance trust's day to day operations or administration of the trust plan; and

2. Brown's employer did not own, control, administer or assume responsibility for the insurance policy or its benefits.

See Appendix A - 5 (emphasis added). In support of its holding, the Court cites only Taggart Corp. v. Life & Health Benefits Admin. Inc., 617 F.2d 1208, 1211 (5th Cir. 1980)., cert. denied, 450 U.S. 1030 (1981).

The Fourteenth Court of Appeals has decided an important question of federal law which directly conflicts with three United States Courts of Appeals' decisions, but, which has not yet been decided by this Court:

> Whether an employer who purchases insurance for its employees through an insurance trust

establishes an "employee welfare benefit plan" if the trust meets the requirements under Section 3(1) of ERISA.

(a) **The Decision of the Fourteenth Court of Appeals Conflicts With Other Courts' Decisions**

In Memorial Hospital System v. Northbrook Insurance Co., 904 F.2d 236 (5th Cir. 1990), the Fifth Circuit Court of Appeals specifically held that an employer need not, as held by the Fourteenth Court of Appeals, administer or assume responsibility for the insurance policy in order to constitute an "employer" under Section 3(5) of ERISA. Id. at 242.

In Memorial Hospital, an employer purchased and provided insurance and other health benefits to all of its employees through a multiple-employer insurance trust, similar to the trust in this case. In addressing ERISA

preemption, the Court in Memorial Hospital first held that there existed a "plan" as that term is defined under ERISA because according to the "group policy" at issue, a reasonable person could ascertain the intended benefits, a class of beneficiaries, the source of funding and the procedures for receiving benefits. Id. at 240. The Court then stated:

> By its express terms, ERISA encompasses welfare plans provided through the purchase of insurance 29 U.S.C. § 1002(1). Moreover, it is a common practice for employers to provide health care benefits to their employees through the purchase of a group health insurance policy from a commercial insurance company. See Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724 (1985). . . . Although we held in Taggart that the purchase of an insurance policy does not, in and of itself, establish the existence of an ERISA plan, we certainly did not hold . . . that an employer's purchase of health insurance offers no evidence of an intent to provide such a plan . . . . Unlike Taggart, the

> present case does not involve the bare purchase of insurance by a lone employee through a MET [Multiple Employer Trust]. [The employer] has chosen to provide welfare benefits to all of its full-time employees through the purchase of a group insurance policy. The fact that [the employer's] administrative functions are minimal is perfectly in keeping with its intent that the [insurance company] administer the plan as well as insure it. There is, thus, an employer-employee-plan relationship that was lacking in Taggart.

Id. at 240, 242 (emphasis added). See also Kanne v. Connecticut General Life Ins. Co., 867 F.2d 489 (9th Cir.), cert. denied, 492 U.S. 906 (1989) ("the problem with Kannes' argument is their apparent assumption that [the employers'] function with respect to the plan determine ERISA coverage"); Kidder v. H&B Marine, Inc., No. 90-3340 (5th Cir. Apr. 12, 1991) (1991 WL 77363) (an individual employer who purchased insurance for his employees through a

multiple employer trust established an "employee welfare benefit plan" notwithstanding that the employer had no "active involvement in the maintenance or administration of the plan").

In applying these decisions, it is apparent that Sonny's, as an "employer", established an "employee welfare benefit" through its adoption of the Insurance Trust. First, there is no dispute that Brown's employer provided and purchased group insurance for all of its employees. (S.F. Tr. 666, 668, 703, 709; Richey Depo. pp. 34, 35, 37, 38, 81, 82) See Donovan v. Dillingham, 688 F.2d 1367, (11th Cir. 1982) ("the purchase of a group policy or multiple policies covering a class of beneficiaries offers substantial evidence that a plan fund or program has been established"). Second, group

insurance was provided and purchased through the Insurance Trust, very similar to the trust in Memorial Hospital and Kidder. (Richey Ex. 2) Finally, the Insurance Trust and the "Group Policy" provided a description of the intended benefits, a class of beneficiaries, a source of financing, and procedures for receiving benefits. (Richey Ex. 2; Richey Ex. 13) Thus, Brown's employer established an "employee welfare benefit plan" under ERISA.

Contrary to the Fourteenth Court of Appeals' decision below, Petitioner need not prove that the individual employers had an "active involvement" in the operations or administration of the trust or plan. This additional requirement of active involvement which the Fourteenth Court of Appeals adopted

from the Taggart decision discussed below, is misplaced, unsupported and conflicts with the overwhelming majority of case law on this issue.

(b) **The Taggart Decision is Inapposite to the Present Action**

Both the Texas Fourteenth Court of Appeals and the trial court, in its Findings of Fact and Conclusions of Law, relied exclusively on one decision in addressing ERISA preemption, Taggart Corp. v. Life and Health Benefits Admin. Inc., 617 F.2d 1208, 1211 (5th Cir. 1980), cert. denied, 450 U.S. 1030 (1981). Taggart, however, has no application in determining whether Brown's employer established an "employee welfare benefit plan" for its employees.

The Taggart case involved a company comprised of one employee who

purchased insurance for himself and his family while attempting to characterize his insurance as a group health plan. Taggart, 617 F.2d at 1210. There was, therefore, an "employer-employee-plan relationship" that was lacking in Taggart. This lack of any "employer-employee-plan relationship" in Taggart was specifically recognized and addressed in both Memorial Hospital, 904 F.2d at 242, and Kidder, No. 90-3340 (5th Cir. April 21, 1991) 1991 WL 77363.[15]

In this case, however, there is no doubt that an "employer-employee-plan relationship" existed. It is undisputed that each employer of the IGA, including Brown's employer, purchased insurance benefits for and on behalf of its

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15. Both of these cases distinguished Taggart based on the lack of an "employer-employee-plan relationship" in Taggart.

employees through the insurance trust. Further, it was impossible for any single employee to purchase insurance on his own. (Richey Depo. p. 34)

The second factor distinguishing Taggart is that there was no intent by an employer in Taggart to provide benefits on any regular or permanent basis. In this case, on the other hand, Brown's employer provided a comprehensive insurance program to all of its employees through the Insurance Trust, which trust was to continue for twenty-one years from the date the trust was executed. (Appendix J-13.)

As stated recently by the First Circuit in Wickman v. Northwestern National Ins. Co., 908 F.2d 1077 (1st Cir. 1990):

> The crucial factor in determining if a "plan" has been established is whether the purchase of the insurance policy constituted an

> expressed intention by the employer to provide benefits on a regular and long term basis. Significantly, there was no indication of a long term commitment in Taggart, where it appears the benefits, what little they amount to, had no sense of permanence.

Id. at 1083 (emphasis added).

In synopsis, Brown's employer, Sonny's, is a statutory "employer" under Section 3(5) of ERISA. Brown's employer purchased insurance benefits for its employees through the Insurance Trust--thereby establishing an "employer-employee-plan relationship." Memorial Hospital, 904 F.2d at 242. Further, Brown's employer expressed an intent, through subscription to the Insurance Trust, to provide benefits on a regular and long term basis. Wickman, 908 F.2d at 1082. Because Sonny's established an "employee welfare benefit plan", all of Brown's claims are preempted.

2. **The IGA Constitutes an "Employer" for the Purpose of ERISA**

Alternatively, Prudential maintains that the IGA is a statutory employer under Section 3(5) of ERISA.

There is no dispute that the Insurance Trust was created by the IGA through a written Agreement and Declaration of Trust. (Richey Ex.2 pp. 1-3; F.S. Tr. 1182-87) The IGA was a party to the Agreement and Declaration of Trust and the Trust itself was referred to as the "Independent Garagemen's Association Trust." (Richey Ex. 2, pp. 1-2) See Dep't of Labor Op. 81-76A (Oct. 14, 1981) (an important factor in determining whether an organization has established an "employee welfare benefit plan" is whether the organization is a party to the trust agreement). The IGA created the Insurance Trust for the purpose of

obtaining major medical and life insurance for the employees of member employers of the IGA. (Richey Ex. 2, p. 1)

The Fourteenth Court of Appeals below based its holding with respect to ERISA on the determination that the Insurance Trust was not established nor maintained by an "employer." This conclusion, however, wholly fails to recognize that the term "employer" includes a "group or association of employers" such as the IGA.

Pursuant to Section 3(5) of ERISA, an "employer" is defined as:

> any person acting directly as an employer or indirectly in the interest of an employer in relation to an employee benefit plan; and includes a group or association of employers acting for an employer in such capacity.

29 U.S.C. § 1002(5) (emphasis added). Without question, the IGA is a "group or

association of employers" which acted for Brown's employer in establishing and maintaining the Insurance Trust. Thus, the IGA is an "employer" for purposes of ERISA.[16]

(a) **The IGA is a "Cognizable Group or Association of Employers With an Organizational Relationship"**

There are two main factors which courts, as well as the Department of Labor, have utilized in determining whether an entity, such as the IGA, constitutes a "group or association of employers acting for an employer" for

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16. In its brief to the Court of Appeals, Respondent Brown argued that Prudential has raised a "new theory" on appeal by now claiming that the IGA is an "employer" as compared to "an employee organization." See p. 14 of Appellees Brief. Brown fails to recognize that during the separate trial on ERISA preemption, Prudential specifically argued that the IGA is both an "employer" and "employee organization" as those terms are defined by ERISA. (E.P. Tr. pp. 49-53). Moreover, Prudential's claim herein is based on an assertion that Brown's causes of action are preempted by ERISA and Prudential has consistently asserted such a claim in both the trial court, Fourteenth Court of Appeals and the Texas Supreme Court.

purposes of ERISA. First, the entity must be a "cognizable, bona fide group or association of employers" with "some organizational relationship among them." See Credit Managers Ass'n of Southern California v. Kennesaw Life & Accident Ins. Co., 809 F.2d 617, 625 (9th Cir. 1987); Dep't of Labor Op. Ltr. 84-11A (Feb. 22, 1984).

The purpose of this requirement is to prevent "unrelated" employers who execute identically worded trust agreements offered by entrepreneurial, independent third parties from being classified as a "group or [an] association of employers." See Dep't of Labor Op. Ltr. 84-11A (Feb. 22, 1984). Typically, such an independent third party is one acting as a "middleman" seeking to profit from the unrelated employers by providing them group

insurance at reduced rates; thus, it is not acting "in the interest of" or on behalf of the employer subscribers. See Wisconsin Educ. Ass'n Ins. Trust v. Iowa State Bd. of Puls. Instruction, 804 F.2d 1059, 1063 (8th Cir. 1986).

In applying this definition, it is apparent that the IGA is a "cognizable, bona fide group or association of employers" because the IGA is a non-profit trade organization composed of only those who are employers in the automotive repair business. (Richey Deposition pp. 11-13, 44, 47) The IGA has the common interest of providing information and support to its members in the automotive repair business, which interest is unrelated to the provision of welfare benefits. The IGA is governed by the IGA by-laws, which dictate the organizational

structure of the IGA and mandate that only employers of the automotive repair business may belong to the IGA (Richey Deposition p. 46-47).

Courts have routinely held that trade organizations or other non-profit associations such as the IGA, are to be considered as "employers" or as a "group or association of employers" for purposes of ERISA. See, e.g., Twin City Pipe Trades Service Ass'n. v. Plaas Plumbing & Heating Co., 815 F.2d 58, 59 (8th Cir. 1987); Minnesota Chamber of Commerce & Industry v. Hatch, 672 F. Supp. 393, 395 (D. Minn. 1987); California Chamber of Commerce v. Simpson, 601 F. Supp. 104, 106 (C.D. Cal. 1985).[17]

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17. In its attempt to distinguish the numerous cases which have held that a trade association, such as the IGA, may be considered as a "cognizable group or association of employers" for purposes of ERISA, Brown argued on appeal that the employers in the IGA lack a common (continued...)

Therefore, because the IGA is a trade association of employers with the common relationship of working as employers in the (i.e., not an entrepreneurial third party), the IGA is a "cognizable group or association of employers" for purposes of ERISA. See Dep't of Labor Op. Ltr. 84-11A (Feb. 22, 1984) (the fact that each participating employer in an association is involved

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17. (...continued)
relationship because the trust agreement itself does not limit its subscribers to those who are in the business of automobile repair. Prudential has provided conclusive, undisputed evidence which shows that "only employees of IGA members can obtain benefits under the trust." See Richey Deposition pp. 33-36. Moreover, it is well-settled that even absent "express terms" of the trust plan which provide that the plan was established to provide benefits to only employees of sponsoring companies, the "surrounding circumstances" can establish that the plan was operated to provide benefits to only those who were employees of the sponsoring companies. Freund v. Marshall & Ilsley Bank, 485 F. Supp. 629, 634 (W.D. Wis. 1979). In this case, the group policy issued by Prudential requires that only employees who are "engaged in the repair and servicing of automobiles" may participate. (Richey Ex. 13, p. 3) Thus, because the "surrounding circumstances" make clear that only employees of members of the IGA can participate in the Trust, Brown's argument fails as a matter of law.

in the "building industry" supports the conclusion that the association is a "cognizable, bona fide group" for purposes of ERISA); Dep't of Labor Op. Ltr. 83-48A (Sep. 14, 1983) (an organization composed of employers from the "banking industry" supports the conclusion that such organization is a "cognizable, bona fide group of employers").

(b) The IGA and Its Employer Members Exercise Control Over the Trust Insurance

The second factor used in determining whether a trust plan has been established and maintained by a "group or association of employers acting for an employer" is whether the association or employers within the association (i.e., Brown's employer) exercise control, either "directly or indirectly," over the Trust. See

Insurance & Prepaid Benefits Trust v. Marshall, 90 F.R.D. 703 (C.D. Cal. 1981); Dep't of Labor Op. Ltr. 84-11A (Feb. 22, 1984); Dep't of Labor Op. Ltr. 83-48A (Sep. 14, 1983); Dep't of Labor Op. Ltr. 80-42A (Jul. 11, 1980).

The purpose of this factor is to ensure that the alleged "group or association" is one which acts in the interest of the employer members in relation to the trust plan. If, on the other hand, an independent third party (i.e., an insurance company) completely controls the trust, the alleged "group or association" cannot act in the interest of or on behalf of the employers in relation to such trust.

In the case of Insurance & Prepaid Benefits Trusts v. Marshall, 90 F.R.D. 703 (C.D. Cal. 1981), the court addressed whether a particular group

could be considered as "a group or association of employers acting for an employer" in its providing of health and life insurance to employees under a trust plan.

The sole issue before the court in Marshall was whether the trust was established or maintained by "a group or association of employers acting for an employer" under ERISA and thus, whether the trust was an "employee welfare benefit plan." In addressing this issue, the court held that there existed an "association of employers" which had established the trust and stated that the important factor in determining whether the trust was maintained by the association of employers, is whether the association is the true "decision making body" of the Trust which "exercises control" over the Trust. Id.

The court in Marshall then identified two factors in determining the existence of "control" in a trust relationship:

> (1) the trustees are representatives of the participating employers; and
>
> (2) the trustees are the true decision making body, independent and distinct from the insurance company.

Id. (emphasis added).

Further, the Department of Labor ("DOL") has issued numerous opinion letters which address the factors used to determine control in a trust relationship. For example, the DOL has stated:

> the employers that participate in a benefit program must, either directly or indirectly, exercise control over that program, both in form and in substance, in order to act as a bona fide employer group or association with respect to the program. [T]he circumstances that tend to support a conclusion that the Trust was maintained by a bona

> fide employer group or association [are that] . . . the participating employers by virtue of their authority to elect a majority of the [trustees], appear to exercise control and direct the activities and operations of the benefit program.

Dep't of Labor Op. Ltr. 83-48A (Sept. 14, 1983).

Moreover, the DOL recognizes that a cognizable "group or association" exercises direct and/or indirect control over a trust plan if:

> The association . . . is given the authority to amend or terminate the Trust and to replace the trustees.

Dep't of Labor Op. Ltr. 84-23A (May 23, 1984) (emphasis added). See also Dep't of Labor Op. Ltr. 84-29A (June 26, 1984) (an association of employers indirectly exercises control over the trust if the association has the authority to elect trustees); Dep't of Labor Op. Ltr. 84-11A (Feb. 22, 1984) (by virtue of their

authority and power to elect trustees of the trust, the association appears to exercise control and direct the activities and operations of the Trust benefit program).

In applying these factors, it is apparent that the IGA and its participating employers exercise both direct and indirect control over the Insurance Trust benefit program. First, the four-member board of trustees of the Insurance Trust are all independent automotive service employers who belong to the IGA and have been active in the IGA since its inception. Accordingly, the trustees are representatives of the IGA and employers of the IGA. (Richey Depo. pp. 32, 88) Second, the trustees are vested with authority to administer the trust, to select the appropriate insurer, and to control the Trust Fund.

(Richey Ex. 2, pp. 2-4) Third, according to the terms of the Agreement and Declaration of Trust, the IGA has control over the Insurance Trust by its powers to remove trustees, to appoint successor trustees and to terminate the Trust. (Richey Ex. 2, pp. 4-5) Fourth, the IGA has the concurrent power to administer the Trust if called upon by the trustees to do so. (Richey Ex. 2, p. 4) Finally, the employer members of the IGA exercise direct control over the Insurance Trust by deciding which deductible will apply to its employees. (Richey Depo. p. 77)

Therefore, based on the express terms of the Insurance Trust and the uncontroverted evidence adduced at trial, this Court should find, as a matter of law, that the IGA and the employer members of the IGA exercise

control, both in form and in substance, over the Insurance Trust. Accordingly, the IGA is a "group and/or association of employers" which established and maintained the Insurance Trust for the IGA members' employers. Thus, the IGA is an "employer" for purposes of ERISA preemption.

### C. THE INSURANCE TRUST WAS ESTABLISHED AND MAINTAINED FOR THE "PURPOSE OF PROVIDING INSURANCE BENEFITS"

Included within the statutory definition of an "employer welfare benefit plan" is

> any plan fund or program . . . established or maintained by an employer . . . for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, . . . medical, surgical or hospital care benefits . . . ."

ERISA Section 3(1), 29 U.S.C. § 1002(1).

The Insurance Trust in this action clearly qualifies as an "employee

welfare benefit plan" because it was established by the IGA to provide life, accident and health insurance for the IGA's members' employees. (Richey Depo. pp. 9-10; Richey Ex. 2, p. 1) According to the Declaration of Trust:

> The purpose of the Trust is to establish and maintain the Fund to provide life and accident and health insurance for employees of [member] employers.

See Richey Ex. 2, p. 1. (emphasis added).

Because the purpose of the Insurance Trust is to provide life, accident and health insurance to the employees of IGA members, the Insurance Trust is an "employee welfare benefit plan" pursuant to Section 3(1) of ERISA. Such Insurance Trust Plan was established and maintained by Brown's employer, Sonny's Automatic Transmission Service, and the IGA.

## D. THE INSURANCE TRUST AND ITS EMPLOYER MEMBERS AFFECT INTERSTATE COMMERCE

The Insurance Trust is an "employee welfare benefit plan" under ERISA that was established and maintained by an "employer" engaged in commerce or in an industry or activity affecting commerce. ERISA Section 4(a), 29 U.S.C. Section 1003(a). The Insurance Trust affects interstate commerce and is not exempt from ERISA.

A welfare plan affects interstate commerce if it is "established and maintained (1) by an employer engaged in commerce or in any industry or activity affecting commerce." ERISA Section 4(a); 29 U.S.C. § 1003(a). The IGA members, and consequently their participants in the Insurance Trust, are independent automotive repair shops and their employees are located in the

United States and several foreign countries. (Richey Depo. pp. 33-34, 48-50) Additionally, Sonny's Automatic Transmission Service, the IGA, and the Insurance Trust, use interstate mail and telephone lines in performing services for the IGA members' employees in Texas and other states. (Richey Depo. pp. 46, 89-91) See Cadillac Ins. Co. v. L.P.C. Distributing Co., 770 S.W.2d 892 (Tex. App.--San Antonio 1989, writ denied). Accordingly, the IGA, Sonny's, and the Insurance Trust operate in, and have an effect upon, interstate commerce.

1. **Because The Insurance Trust is an "Employee Welfare Benefit Plan" Established by an "Employer," All of Brown's Claims are Preempted Under ERISA**

In his petition, Brown alleged breach of contract, breach of the duty of good faith and fair dealing, and gross negligence, all of which are state

law claims and thus preempted by ERISA. (S.F. Tr. 34-40) Gorman v. Life Insurance Co. of North America, No. C-7806 (Tex. March 27, 1991) (1991 WL 7964) (claims against insurance company for breach of contract, breach of good faith and fair dealing and breach of duty based on an "employee welfare benefit plan" are preempted by ERISA).

Brown had the burden of pleading, proving and requesting findings on any ERISA cause of action. Tex. R. Civ. P. 278, 279; see also Felts v. Graphic Arts Employee Benefit Trust, 680 S.W.2d 891, 894 (Tex. App. -- Houston [1st Dist.] 1984, no writ). The transcript contains no such pleadings, no evidence was introduced to support an ERISA cause of action and no findings were requested in support of such cause of action.

At a post-verdict hearing on March 31, 1989, the trial court granted Brown leave to file, in the alternative to his state law claims, a trial amendment raising claims under ERISA. Brown, however, chose not to do so. Therefore, Prudential is entitled to judgment, as a matter of law, based on ERISA preemption. Cathey v. Metropolitan Life Ins. Co., 805 S.W.2d 387 (Tex. 1991) (affirming lower court's dismissal of state law claims based on ERISA preemption when plaintiff's "were offered the opportunity to amend their petition to assert an ERISA cause of action, but expressly refused to do so").

2. Policy

Brown's employer and all of the employee members of the IGA should be given the adequate security that their

plan (i.e., Insurance Trust) is protected by ERISA and that there will be no unnecessary litigation in determining or applying conflicting law. Moreover, this Court's holding will have policy effects far beyond the scope of the dispute between Prudential and Billy Brown. By refusing to recognize Brown's employer or the IGA as an ERISA "employer" which established the benefit plan at issue, this Court will deprive the employees of small businesses -- "mom and pop" businesses too small to obtain group insurance on their own -- of the overall protections that Congress intended ERISA to give them. ERISA will only protect the employee welfare benefit plans of those fortunate enough to work for larger companies, who do not have to band together through a trade association, such as the IGA, in order

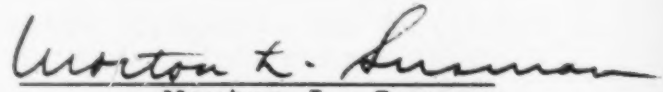
to obtain group insurance. That is directly contrary to the intent of Congress that ERISA is to be "liberally construed" to cover all employee benefit plans not expressly exempted. See, e.g., H. Conf. Rep. No. 1280, 93d Cong., 2d Sess. (1974), reprinted in 1974 U.S. Code Cong. & Ad. News 4639, 5038, 5038-39.

## Conclusion

WHEREFORE, Prudential Insurance Company of America, Petitioner, prays that a writ of certiorari issue from this Honorable Court to review the judgment of the Texas Fourteenth Court of Appeals below. If the petition is granted, Petitioner prays that the judgment of the Fourteenth Court of Appeals be reversed, and judgment rendered in favor of Prudential, or, in the alternative, remanded with

appropriate instructions to the trial court below.

Respectfully submitted,



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## CERTIFICATE OF SERVICE

4th I hereby certify that on the day of June, 1991, three (3) copies of the Petitioners' Petition for Writ of Certiorari were served by first class mail, postage prepaid, to Millard A. Johnson, 4500 First Interstate Bank, 1000 Louisiana, Houston, Texas 77002-5012, (713) 224-5771. All parties required to be served have been served. I am a member of the Bar of this Court.

Morton L. Susman

MORTON L. SUSMAN
Counsel of Record